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No. 96-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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The respondent's asserted bases for denying certiorari in this case are meritless. Importantly, respondent fails to grapple substantively with the issues presented by petitioners and argues instead that such issues should await further amendment of the complaint and discovery. That, however, is precisely what the qualified immunity doctrine in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny is intended to prevent.

I. RESPONDENT'S ARGUMENT THAT HE NEEDS TO AMEND THE COMPLAINT AND TAKE DISCOVERY IS WITHOUT MERIT.

Respondent's principal argument against certiorari is that the district court and the Ninth Circuit were correct in not dismissing his first amended complaint "without allowing Respondent leave to flesh out his allegations of misconduct." Resp. Br. at 7. Respondent further states that the district court stayed all proceedings following petitioners' notice of appeal thereby "ma[king] it impossible for Respondent to amend his complaint." Resp. Br. at 5. He "intends" once the stay is lifted "to move to amend his Complaint, if necessary." *Id.*

Respondent's argument is erroneous at best and disingenuous at worst. The district court invoked no such prohibition. To the contrary, on May 2, 1995, the district court entered an Order stating that "all proceedings [are] stayed pending appeal, *except Plaintiff may file a motion to amend his complaint*" (emphasis supplied). The district court has never precluded respondent from amending his complaint and he has never sought to do so.[1]

Moreover, respondent's argument is antithetical to the Court's precedents. The Court has repeatedly emphasized that the "essence" of qualified immunity is the "entitlement not to stand trial or face the other burdens of litigation," *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985), including "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow,* 457 U.S. at 817. Thus, this Court has admonished the lower courts vigorously to apply qualified immunity "at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991). "Until this threshold immunity question is resolved, discovery should not be al-

[1] Respondent did amend his complaint early in this case and well before the district court's January 23, 1995 memorandum opinion and order denying petitioners qualified immunity.

lowed." *Siegert v. Gilley*, 500 U.S. 226, 231 (1991), quoting *Harlow*, 457 U.S. at 818. Importantly, the Court recognized in *Siegert* that

> [a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

500 U.S. at 232. Although that statement was made in the context of a motion for summary judgment asserting qualified immunity, a logical corollary is that respondent can withstand a motion to dismiss asserting qualified immunity only if he, at a minimum, has stated facts in his complaint sufficient to establish a violation of clearly established law. Indeed, as the Court recognized in *Butz v. Economou*, 438 U.S. 478, 507-08 (1978),

> [i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.

Respondent has failed to meet his burden and nothing he says in his opposition brief undermines that conclusion. He has alleged no facts to justify a denial of qualified immunity to petitioners. The district court readily acknowledged the deficiencies in the amended complaint but nonetheless concluded respondent may engage in discovery because he "may be able to prove" that the petitioners violated his constitutional rights. Appendix at 52a. The Ninth Circuit in turn both erroneously relied on withdrawn allegations and failed to engage in the appropriate legal analysis of the asserted claims mandated by both its own and this Court's precedents. Appendix at 10a, 23a-24a.

The bottom line is that absent the issuance of a writ of certiorari by this Court, petitioners will be forced to

engage in the very burdens of protracted and distracting litigation that this Court has decried on many occasions. If the factually threadbare amended complaint in this case can withstand a qualified immunity motion to dismiss, the promise of immunity and an "early exit" from litigation has indeed become illusory. *Veney v. Hogan,* 70 F.3d 917, 922 (6th Cir. 1995).[2]

II. RESPONDENT HAS FAILED TO IDENTIFY ANY VIOLATION OF CLEARLY ESTABLISHED LAW.

In an apparent effort to get around the Ninth Circuit's abdication of its responsibility to examine whether each of the alleged constitutional violations is violative of clearly established law, respondent attempts the effort. First, respondent simply states without elucidation that petitioners concede the denial of food can sometimes rise to a constitutional violation. Resp. Br. at 10. Although that is true, respondent utterly ignores petitioners' point that the factual allegations of his amended complaint make it impossible to conclude that any denial of food to respondent—if it occurred—rose to the level of a constitutional violation. Indeed, the Ninth Circuit itself recently held that inadequate factual allegations concerning food deprivation do not state a constitutional violation. *May v. Baldwin,* 109 F.3d 557, 566 (9th Cir. 1997).

Second, respondent's implication that petitioners made a concession by not addressing the allegation that respondent was locked naked in a windowless room, photographed and threatened, Resp. Br. at 10, is devoid of merit. Petitioners did not argue this point because even the district court did not adopt it. That court explicitly noted in its opinion that "[i]t is unclear whether Alvarez claims that this incident amounted to a constitutional tort." Appendix at 52a n.10. Thus, the court ignored the point.

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[2] Respondent's argument that he needs discovery is also without merit because he was present at the events he calls into question. Discovery will thus shed no additional light on the facts.

Third, respondent argues that petitioners have failed to demonstrate "that incommunicado incarceration can never violate a pre-trial detainee's constitutional rights." Resp. Br. at 10. Respondent's analysis is backwards. It is his burden, not petitioners', to demonstrate that the law in this area is clearly established. If petitioners can demonstrate, as they have, that the law is not clearly established then qualified immunity must be accorded to petitioners.

Fourth, respondent argues that none of the cases cited by petitioners "establish that threats can never rise to the level of a constitutional violation." Resp. Br. at 10. Again, respondent's analysis is backwards. Petitioners need show only that the law is not clearly established. The cases cited by petitioners do that, as "[v]erbal harassment or abuse" of prisoners "is not sufficient to state a constitutional deprivation." *Oltarzewski v. Ruggiero,* 830 F.2d 136, 139 (9th Cir. 1987), quoting *Collins v. Cundy,* 603 F.2d 825, 827 (10th Cir. 1979). Moreover, the threats in those and the other cases cited by petitioners were explicit. Here the amended complaint does not tell us what threats were made and by whom and thus the petitioners should be accorded qualified immunity here as well.

Fifth and finally, respondent, like the courts below, completely ignores the second prong of the qualified immunity inquiry—whether the petitioners' conduct, as alleged by the amended complaint, was objectively reasonable.

III. RESPONDENT MISCONSTRUES PETITIONERS' ARGUMENT CONCERNING THE APPLICABLE LEGAL STANDARD FOR MOTIONS TO DISMISS ASSERTING QUALIFIED IMMUNITY.

Respondent argues that petitioners have waived any argument that a heightened pleading standard applies to this case. This misconstrues petitioners' argument. Petitioners have not argued that a heightened pleading standard applies here. Rather, petitioners argue that the appro-

priate legal standard applicable to a motion to dismiss asserting qualified immunity is an important issue the Court should decide.[3]

This case is an excellent vehicle for that issue because it presents a complaint which is virtually devoid of factual allegations concerning petitioners' alleged wrongdoing. Indeed, as to the petitioners other than Berellez, respondent's complaint contains *no allegation at all* that they even participated in any of the activities which underlie respondent's surviving claims. The Ninth Circuit's decision to permit this complaint to survive a motion to dismiss, if allowed to stand, would permit any plaintiff to engage in discovery of government officials on the basis of nothing more than conclusory allegations of constitutional violations by another official in their agency. This is precisely the result that the doctrine of qualified immunity is designed to prevent.

CONCLUSION

For each of the foregoing reasons, and for the reasons set forth in petitioners' opening brief, the petition for certiorari should be granted.

Respectfully submitted,

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[3] The Court recently granted certiorari in *Crawford-El v. Britton*, 65 U.S.L.W. 3817 (June 17, 1997), to address the question, different than that presented here, of whether and what heightened pleading standard applies in constitutional tort cases asserting an improper motive. That case, unlike this one, arises in the context of a motion for summary judgment.